

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

MICHAEL BANKS, et al,

Plaintiffs,

No. CIV S- 05-0742 MCE GGH P

vs.

STATE OF CALIFORNIA, et al.

Defendants.

ORDER

Plaintiffs, state prisoners proceeding pro se, have filed a document entitled “petition for injunction against fraud and declaratory judgment.” This proceeding was referred to this court by Local Rule 72-302 pursuant to 28 U.S.C. § 636(b)(1). Plaintiffs Michael Banks, Alvin Mack, and Tracy Gilmore set forth various federal statutes under which they purport to proceed. Based on the allegations of their filing, the court is unable to discern whether plaintiffs intend to proceed under 42 U.S.C. § 1983 or pursuant to 28 U.S.C. § 2254.

No plaintiff has filed an in forma pauperis affidavit pursuant to 28 U.S.C. § 1915, or paid the filing fee for either a civil rights complaint or for a habeas petition. The filing fee for a civil rights action is \$250.00; the filing fee for a petition for writ of habeas corpus is \$5.00.

To the extent that plaintiffs intend to bring a class action, they have failed to take even the initial step of filing a motion for the court to certify this matter as a class action,

1 pursuant to Fed. R. Civ. P. 23. Moreover, plaintiffs are non-lawyer inmates proceeding without  
2 counsel.

3 It is well established that a layperson cannot ordinarily represent the interests of a  
4 class. See McShane v. United States, 366 F.2d 286 (9th Cir. 1966). This rule becomes almost  
5 absolute when, as here, the putative class representative is incarcerated and proceeding pro se.  
6 Oxendine v. Williams, 509 F.2d 1405, 1407 (4th Cir. 1975). In direct terms, plaintiff cannot  
7 “fairly and adequately protect the interests of the class,” as required by Rule 23(a)(4) of the  
8 Federal Rules of Civil Procedure. See Martin v. Middendorf, 420 F. Supp. 779 (D.D.C. 1976).  
9 Plaintiff’s privilege to appear in propria persona is a “privilege . . . personal to him. He has no  
10 authority to appear as an attorney for others than himself.” McShane v. U. S., 366 F.2d 286, 288  
11 (9<sup>th</sup> Cir.1966), citing Russell v. United States, 308 F.2d 78, 79 (9th Cir. 1962); Collins v. O’Brien,  
12 93 U.S.App.D.C. 152, 208 F.2d 44, 45 (1953), cert. denied, 347 U.S. 944, 74 S.Ct. 640 (1954).  
13 Therefore, this action will not be construed as a class action.

14 The complaint is difficult to follow; plaintiffs allege, inter alia, that defendants, on  
15 or before March 7, 1994, have acted to “recall slavery back into the United States in their overt  
16 acts to maintain a secret empire within the California penal system in relation to forms of  
17 applications of law that is prohibited by the United States Constitution to enforce laws....” which  
18 “return black people to the condition of peonage or slavery....” Complaint, p. 2. Although it is  
19 by no means clear, plaintiffs appear to be challenging the constitutionality of the three-strikes  
20 law, Cal. Penal Code § 667, as an ex post facto law which abridges plaintiffs “constitutional  
21 right” to enter into plea bargains. Id. Plaintiffs purport to sue the State of California and the  
22 Government Claims Board.

23 The Eleventh Amendment serves as a jurisdictional bar to suits brought by private  
24 parties against a state or state agency unless the state or the agency consents to such suit. See  
25 Quern v. Jordan, 440 U.S. 332 (1979); Alabama v. Pugh, 438 U.S. 781 (1978)( per curiam);  
26 Jackson v. Hayakawa, 682 F.2d 1344, 1349-50 (9th Cir. 1982). In the instant case, the State of

1 California has not consented to suit. Accordingly, plaintiffs' claims against the State of  
 2 California and the Government Claims Board are frivolous and must be dismissed.

3 In addition, although plaintiffs attach various exhibits, within the allegations, they  
 4 make only vague and conclusory claims, unsupported by any factual underpinning. It is possible  
 5 that plaintiffs seek declaratory relief in the form of having the three strikes law declared  
 6 unconstitutional. On the other hand, they may be intending to allege racial discrimination within  
 7 the state penal or prison system. To the extent plaintiffs seek release from confinement, they  
 8 must individually proceed pursuant to 28 U.S.C. § 2254. If the nature of the claim is such that it  
 9 would necessarily imply the invalidity of a prisoner's conviction or continuing confinement, a  
 10 prisoner must bring a habeas petition. Butterfield v. Bail, 120 F.3d 1023, 1024 (9th Cir. 1997).

11 § 1983 must yield to the more specific federal habeas statute with  
 12 its attendant procedural and exhaustion requirements, where an  
 13 inmate seeks injunctive relief challenging the fact of his conviction  
 14 or the duration of his sentence. See Preiser v. Rodriguez, 411 U.S.  
 15 475, 489, 93 S. Ct. 1827 [] (1973). Such claims fall within the  
 16 'core' of habeas corpus and are thus not cognizable when brought  
 17 pursuant to § 1983. Ibid. By contrast constitutional claims that  
 18 merely challenge the conditions of a prisoner's confinement,  
 19 whether the inmate seeks monetary or injunctive relief, fall outside  
 20 of that core and may be brought pursuant to § 1983 in the first  
 21 instance. See Muhammad v. Close, 540 U.S. 749 ----, 124 S.Ct.  
 22 1303, 1304 [] (2004) (per curiam); Preiser, supra, at 498-499, 93 S.  
 23 Ct. 1827.

18 Nelson v. Campbell, 541 U.S. 637, 124 S. Ct. 2117, 2122 (2004):

19 On the other hand, if plaintiffs intend to allege that they are subject to racial  
 20 discrimination as a condition of their prison confinement, each should proceed in individual  
 21 actions pursuant to 42 U.S.C. § 1983. The Federal Rules of Civil Procedure provide "[p]arties  
 22 may be dropped or added by order of the court on motion of any party or of its own initiative at  
 23 any stage of the action and on such terms as are just. Any claim against a party may be severed  
 24 and proceeded with separately." Fed. R. Civ. P. 21. Courts have broad discretion regarding  
 25 severance. See Davis v. Mason County, 927 F.2d 1473, 1479 (9th Cir. 1991).

26 In this court's experience, an action brought by multiple inmate plaintiffs

1 proceeding pro se presents procedural problems that cause delay and confusion. Delay often  
2 arises from the frequent transfer of inmates to other facilities or institutions, the changes in  
3 address that occur when inmates are released to parole, and the difficulties faced by inmates who  
4 attempt to communicate with each other and with unincarcerated individuals. Therefore, the  
5 claims of each plaintiff will be severed from those of any other plaintiff.

6           The court is unable to discern precisely how each plaintiff intends to proceed, no  
7 party having filed an in forma pauperis affidavit and no colorable claim having as yet been set  
8 forth. This complaint will be dismissed as to each plaintiff with leave granted for each to file an  
9 appropriate civil rights action under 42 U.S.C. § 1983 or to file an application for a writ of  
10 habeas corpus pursuant to 28 U.S.C. § 2254, within 30 days. In either case, each plaintiff must  
11 also file an in forma pauperis affidavit or the required filing fee, along with the amended filing,  
12 either a civil rights complaint or a habeas petition. See 28 U.S.C. §§ 1914(a), 1915(a). If each  
13 plaintiff files an amended complaint, he must demonstrate how the conditions complained of  
14 have resulted in a deprivation of plaintiff's constitutional rights. See Ellis v. Cassidy, 625 F.2d  
15 227 (9th Cir. 1980). Also, the complaint must allege in specific terms how each named  
16 defendant is involved. There can be no liability under 42 U.S.C. § 1983 unless there is some  
17 affirmative link or connection between a defendant's actions and the claimed deprivation. Rizzo  
18 v. Goode, 423 U.S. 362 (1976); May v. Enomoto, 633 F.2d 164, 167 (9th Cir. 1980); Johnson v.  
19 Duffy, 588 F.2d 740, 743 (9th Cir. 1978). Furthermore, vague and conclusory allegations of  
20 official participation in civil rights violations are not sufficient. See Ivey v. Board of Regents,  
21 673 F.2d 266, 268 (9th Cir. 1982).

22           Should any plaintiff file a petition for writ of habeas corpus, he must set forth the  
23 specific sentence or conviction he wishes to challenge and the grounds for his challenge. Each  
24 plaintiff will be provided the appropriate forms for a civil rights action and for a habeas petition  
25 in this district.

26           Each plaintiff will proceed with his own action and will be solely responsible for

1 his own action. Each plaintiff will be given thirty days to file, in his own action, an amended  
2 complaint or a habeas petition, and a new application for leave to proceed in forma pauperis,  
3 using the forms provided by the court with this order. Each plaintiff is cautioned that if an  
4 individual action proceeds further it is probable that each plaintiff will incur a liability in the  
5 amount of the \$250.00 filing fee, which amount will be collected from the inmate's prison trust  
6 account.<sup>1</sup> See 28 U.S.C. § 1915(b). If each plaintiff proceeds as petitioner, each will be subject  
7 to a \$5.00 filing fee.

8 The Clerk of the Court will be directed to assign the new actions to the same  
9 district judge and magistrate judge assigned to the instant action. The Clerk of the Court shall  
10 make appropriate adjustment in the assignment of civil cases to compensate for this  
11 reassignment.

12 Accordingly, IT IS ORDERED that:

13 1. The claims of plaintiffs Alvin Mack and Tracy Gilmore are severed from the  
14 claims of Michael Banks;

15 2. Plaintiff Michael Banks shall proceed as the sole plaintiff in case No. CIV S-  
16 05-0742 MCE GGH P;

17 3. The Clerk of the Court is directed to:

18 a. Open two separate civil actions for plaintiffs Alvin Mack and Tracy  
19 Gilmore ;

20 b. Assign each action to the district judge and magistrate judge to whom  
21 the instant case is assigned and make appropriate adjustment in the assignment of  
22 civil cases to compensate for such assignment;

23 c. File and docket a copy of this order in each of the two files opened for  
24 the plaintiffs listed in number 3a above;

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25 <sup>1</sup> See Information to Prisoners Seeking Leave to Proceed with a Civil Action in Federal  
26 Court In Forma Pauperis Pursuant to 28 U.S.C. § 1915.

d. Place a copy of the complaint, filed April 18, 2005, in each of the files opened for the plaintiffs listed in number 3a above;

e. Strike from the caption of each plaintiff's complaint all plaintiffs' names except the name of the individual plaintiff proceeding in the action;

f. Send each plaintiff an endorsed copy of his complaint bearing the amended caption and the case number assigned to his own individual action.

4. Each plaintiff's complaint is dismissed;

5. The Clerk of the Court is directed to send each plaintiff a form for filing a civil rights action under 42 U.S.C. § 1983, a form for filing a habeas petition pursuant to 28 U.S.C. § 2254, and an Application to Proceed In Forma Pauperis By a Prisoner; and

6. Each plaintiff is granted thirty days from the date of service of this order to file an amended complaint or a habeas petition, and an application to proceed in forma pauperis, using the forms provided by the court with this order. Each plaintiff's documents must bear the docket number assigned to his own individual case. Each plaintiff must file an original and two copies of his amended complaint or his habeas petition. Failure to file an amended complaint or habeas petition and an application to proceed in forma pauperis in accordance with this order will result in a recommendation that each plaintiff's action be dismissed.

DATED: 7/12/05

/s/ Gregory G. Hollows

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GREGORY G. HOLLOWS  
UNITED STATES MAGISTRATE JUDGE

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